Supreme Court, U.S.
FILED
JUL - 5 1994
OFFICE OF THE CLERK

No. 94-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HENRY D. SEDGWICK STERN and WALTER B. SLOCOMBE, Personal Representatives of the Estate of Philip M. Stern,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., LAWRENCE A. BOSSIDY, EDWARD E. HOOD, JR., RICHARD T. BAKER, JAMES G. BOSWELL II, SILAS C. CATHCART, CHARLES D. DICKEY, JR., LAWRENCE E. FOURAKER, HENRY H. HENLEY, HENRY L. HILLMAN, ROBERT E. MERCER, GERTRUDE G. MICHELSON, BARBARA SCOTT PREISKEL, LEWIS T. PRESTON, FRANK H. T. RHODES, ANDREW C. SIEGLER and WALTER B. WRISTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a corporation's use of political action committee (PAC) funds to influence Congressional legislation obligate the corporation to file reports of its PAC expenses under the Federal Regulation of Lobbying Act ("FRLA") 2 U.S.C. Sections 261-270?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry D. Sedgwick Stern and Walter B. Slocombe, as representatives of the Estate of Philip M. Stern , respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The per curiam opinion of the Court of Appeals, *Stern v. General Electric Co.*, __ F.3d __ (2d Cir. 1994) (1994 WL 187028) was not yet reported in the Federal Reporter at the time of filing of this petition. It is printed in the Appendix ("Pet. App.") at A - 1. The relevant opinion of the District Court, *Stern v. General Electric Co.*, No. 86 Civ. 4055 slip op. (S.D.N.Y. June 2, 1992) (1992 WL 138339) is printed at Pet. App. B - 1.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). This is a stockholder's derivative action and jurisdiction in the District Court was founded on diversity of citizenship under 28 U.S.C. Section 1332(a)(1).

STATUTES INVOLVED

The statute at issue in this case is the Federal Regulation of Lobbying Act ("FRLA"). 2 U.S.C. Sections 261-270. The full text of FRLA is set forth at Pet. App. C-1, pursuant to Rule 14(1)(f) of the Rules of the Supreme Court of the United States. Also at issue is the Federal Election Campaign Act, the pertinent section of which (2 U.S.C. Section 441b) is set forth at Pet. App. D-1.

STATEMENT OF THE CASE

The petition challenges a decision by the United States Court of Appeals for the Second Circuit which upheld the District

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[1] Philip M. Stern, the original plaintiff, died on June 1, 1992. With leave of the Court, the representatives of his estate have been substituted in his place. Mr. Slocombe recently resigned to accept a public position and has been replaced by David Stern. In this petition, we will refer simply to "plaintiff".

Court's refusal to permit plaintiff to amend his shareholders derivative complaint against General Electric Company ("GE") and its board of directors to reassert a claim of violation of the Federal Regulation of Lobbying Act.

The principal issue raised by this petition is whether under FRLA GE must report certain corporate expenditures associated with the operations of the GE Political Action Committee ("GE/PAC") in light of the revelation during discovery that GE/PAC contributions are made to Congressional incumbents by GE's Washington lobbyists and are used solely as a tool to influence the legislative process. This is the first time this issue is before this Court.

A decision that GE has violated FRLA will not merely establish that Management has violated its fiduciary obligations under New York law, it will also have highly significant – and beneficial – ramifications for the federal legislative and electoral processes.

Statutory Background

In 1946, Congress passed FRLA in order to subject to public scrutiny activities of paid lobbyists who attempt to influence the lawmaking process. The purpose of FRLA was to dispel the public perception of corruption in that process and to combat and forestall actual corruption. Generally, FRLA applies to persons who collect or expend money to "influence directly or indirectly the passage or defeat of any legislation by the Congress of the United States." 2 U.S.C. Section 266.

FRLA requires lobbyists to file detailed reports and statements of account, reflecting a range of information, including amounts collected and expended to influence the passage or defeat of legislation. *See* 2 U.S.C. Sections 264, 267.

GE has one entire Washington corporate office and a portion of an additional office devoted primarily to lobbying activities which fall under the definitions of FRLA.

GE also pays the solicitation and administrative costs of its in-house political action committee – GE/PAC. This case concerns the nexus between the GE/PAC expenses and the GE lobbyists.

Political action committees ("PACs") have their genesis in the campaign finance reforms associated with the post-Watergate era and are a creature of the Federal Election Campaign Act ("FECA"), 2 U.S.C. Section 431 *et seq.*

PACs were intended to constrain the abuses and undue influence associated with large campaign contributions from business and industry, while providing individual corporate employees a vehicle for giving financial support to candidates for government office.

The purposes of the GE/PAC as stated in its Articles of Association seem benign:

> . . . to support the nation's political processes and advance the nation's economic, social and political welfare by affording General Electric Management personnel the opportunity to take a more active part in the political process by contributing funds to support candidates for federal office, national parties and state and local candidates where permissible under federal law.

However, the overwhelming, undisputed evidence in the record reveals that GE/PAC is not an independent "Committee" devoted to encouraging political activity by GE employees. Rather, the campaign contributions operation of the GE/PAC is actually run by GE's Washington Corporate Office – its principal lobbying operation – which reports directly to GE's top Management and controls all decisions on where and how GE/PAC contributions are to be made. The sole function of the PAC committee is to raise the funds which are then expended by GE's lobbying operation to help GE wield influence in Congress.

Contributions to Incumbents

Contributions from GE/PAC are made overwhelmingly to *incumbents* (over 90%). Indeed, there is an affirmative company policy *not* to make contributions to challengers seeking to unseat incumbents. In addition, GE/PAC contributions are intentionally used to maintain political balance between Democrats and Republicans in Congress; and contributions are concentrated on Members of Congressional committees with jurisdiction over legislation of interest to GE's various business divisions. These facts are essentially undisputed and are well understood by GE's top Management and inside Directors.

The consistent policy of GE/PAC support for incumbents is demonstrated conclusively in a report by plaintiff's campaign finance expert based on a review of GE/PAC records:

> In election cycle after election cycle, incumbents — both Democrats and Republicans — draw the overwhelming majority of GE's PAC dollars. Since the 1975-76 cycle, incumbent office-holders have never received less than 72 percent of the PAC's overall contributions; in six of the nine election cycles studied, their proportion has been 90 percent or higher.[2]

This is a conscious, deliberate policy, openly acknowledged by GE's Executive Vice President in charge of overseeing GE's Washington operations, Frank P. Doyle. The reason for incumbent support, testified Doyle, is that:

> ". . . they usually win and you have to deal with them on an ongoing basis."

Doyle concedes openly that the GE/PAC strategy is to contribute to: "people who are influential, who stay in Congress over time, who have positions of seniority and influence and who are leaders on the issues."

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[2] Plaintiff's expert noted that over a total 18-year period, GE/PAC contributions to incumbents surpassed gifts to challengers by a ratio of 25:1.

GE Washington lobbyist Neil T. Messick testified that "PAC contributions are part of a lobbyist strategy." He described the function as "building relationships":

> A. It was our hope that in making a contribution to a particular candidate that it would increase our chances of coming before a member to argue our views on a particular issue.
>
> Q. How would it increase your chances?
>
> A. It was, as I said before, we hoped that the member would feel a greater relationship to the company and th[illegible] be more willing to allow us to make our case.

While supporting incumbents may serve GE's lobbying goals it harms the nation's system of popular election by perpetuating incumbents in office and preventing meaningful challenges by non-incumbent candidates for their seats.

Preserving the Status Quo

GE also knowingly frustrates the traditional two-party electoral system in Congress by deliberately dividing GE/PAC contributions in order to give to 'both sides of the aisle,' thereby further locking in the *status quo*.

The difference between the GE/PAC approach and that of other corporate PACs was explained in a confidential memorandum to GE Chairman John F. ("Jack") Welch and Executive Vice President Doyle on the results of the 1984 Congressional elections:

- The GE/PAC supported *forty Senate candidates* in the November, 1984 elections.
  - *Thirty-one won.*
  - Four lost.
  - Three were defeated in primaries.
  - Two decided to retire (Tsongas, Tower).

- On the House side, we contributed to 256 candidates (plus one contribution to a 1982 deficit). *Of the 256 House candidates:*

  - *Two hundred twenty-five won.*
  - Five ran for the Senate (three lost, two won).
  - One ran for Governor (won).
  - Nineteen lost.
  - One race undecided.
  - Two are deceased.
  - Two lost in primaries.
  - One dropped out before primary.

- These results reflect *the strategy of the GE/PAC, i.e., to build relationships versus ideological corporate PACs which seek to change the composition of the Congress.* (Emphasis added in final paragraph.)

This GE/PAC strategy not to change the "composition" of Congress is one more example of how Management's operation of the GE/PAC violates the PAC's stated purposes "to support the nation's political processes." The purpose is, rather, to undermine the political process by purchasing influence (euphemistically termed "building relationships") with incumbent Members of Congress through PAC contributions which help to render them impervious to electoral challenge.

Solicitation and Control of PAC Contributions

The top Management of GE, including GE Chairman Welch, is significantly involved in the fundraising effort to supply the PAC with money to be doled out in the company's lobbying operation. Welch is active in several ways, among them making a personal appeal to members of the Corporate Executive Council to contribute; making a regular annual sales pitch for the PAC to GE Operating Managers; setting levels for employees; and participating in special videotapes used to persuade senior employees to contribute to the GE/PAC.

Most significant of all is the relationship of GE/PAC operations to GE's lobbying effort – a program of sufficient importance that *weekly reports* of GE's lobbying activities are submitted directly to Board Chairman Welch.

Welch's top aide on GE's lobbying operation is Executive Vice President Doyle, who is one of the key members of GE's headquarters Management team. Phillip S. Peter, who runs the Washington Corporate Office, and Susan B. Walter, who is Secretary of the GE/PAC (based in the Washington office) both report directly to Mr. Doyle. Peter talks to Doyle about legislative issues on the telephone once or twice a week, and Doyle himself visits the GE Washington Office in person a couple of times a month.

Management's involvement in the lobbying effort is inseparable from the role of the GE/PAC, which Management has made an integral part of the entire lobbying effort.

The Great Engine War

A dramatic example of GE Management's involvement in GE/PAC operations is referred to within the company as "The Great Engine War."

This is how Chairman Welch described this lobbying operation during his deposition:

> We were lobbying to keep the competition going; may the best man win.

When Welch learned that GE's competitor United Technologies had made PAC contributions to key members of the Congressional Committee, he demanded to know how GE/PAC stacked up in the contributions it had made. ("Frank – How did we do against these guys? Jack.") What he learned was that GE had actually *outdone* United Technologies. This was the report he got back from the GE/PAC Secretary:

Mr. J. F. Welch
E3E

Dear Jack:

I pulled together GE's PAC numbers on the *Hartford Courant* story of July 17th the day it appeared, assuming we would get a press inquiry. We haven't yet.

The *Courant* story is only slightly wrong. There are five, not seven Senators on the Senate Defense Appropriations Sub-committee up for reelection this year. The GE PAC has contributed to all five. UTC contributed to four of the five. The *Courant* is correct in reporting that UTC did not contribute to Bennett Johnston.

What emerges clearly is that UTC focused on the senior Republicans, whereas we had a balanced, bipartisan approach to our contributions.

Welch translated his interest in the Great Engine War into direct action and personally went to Washington to lobby Congress on the engine competition issue. It was not the only time he did so. Welch acknowledges lobbying Congress for GE on at least three different occasions.

The Great Engine War demonstrates graphically the close connection between GE's government relations activities and the placement of GE/PAC contributions. In no sense can it be said that the PAC is an independent operation run by those who contribute the funds. It is plainly a Management lobbying tool of major significance.

GE Board Chairman Welch candidly acknowledges that the GE/PAC is used to gain "access" to Members of Congress:

Q. Do you know what the strategy of the GE PAC is?

A. To be sure that GE gets access to as broad an audience as possible to make its case on issues.

"Access" is an accepted euphemism meaning "inside track." It is intended to convey the idea that GE/PAC contributions buy a special privilege for GE lobbyists to present their case to Members of Congress and their staffs.

The Moynihan "Access"

GE Management has not been satisfied with simply claiming it has generalized "access". In the case of Daniel Patrick Moynihan, the Senior Senator from New York, GE told its Management employees that GE's "access" from GE/PAC contributions enabled GE representatives to rouse the Senator *out of bed* at 3:00 o'clock one morning to cast the deciding vote on a bill which saved a GE division some $2 million a year.

This Moynihan "access" was trumpeted by GE in a videotaped sales pitch to persuade Management employees to contribute to the GE/PAC. The typed transcript of the GE videotape segment reads as follows:

> MR. WILLIAMS: I have got to add [to] that one funny story about Moynihan because you mentioned Senator Moynihan. A few years ago when we were dealing with a piece of legislation at Audio. There was a vote being taken that was being taken in a marathon session where we woke up Senator Moynihan at three in the morning to cast the deciding vote on a piece of legislation that saved Audio two million dollars a year because of that vote. And if you want to think about access, that's access right into the bedroom.
>
> MR. COX: You don't want to be a total stranger and shake him at three in the morning.
>
> MR. WILLIAMS: No.
>
> MR. COX: You need to know his wife also.

This claim that GE has "access right into the bedroom" of a United States Senator, complete with snide reference to the Senator's wife, demonstrates exactly why the purchase of "access" through the use of PAC funds is so harmful to public confidence in the Congress of the United States. [Senator Moynihan has filed a declaration in this case denying recollection of any such incident.]

Although he was not directly involved in the Moynihan segment of the tape, GE Chairman Welch appears in person on the very same videotape, giving it added credibility and emphasis.

The Decisions Below

Based on the foregoing evidence that GE/PAC was in effect a front for GE lobbyists, plaintiff moved to amend his complaint to reassert a claim based on defendant's violation of FRLA. The District Court's rationale for refusing plaintiff's motion was "We do not agree that the information provided in discovery, as argued by plaintiff, justifies re-pleading a claim that was found to be specifically and entirely unfounded under law. *Harriss v. United States*, 347 U.S. 612, 623 (1954)." (B-6) The Second Circuit Court of Appeals affirmed "for substantially the reasons stated below." (A-2)

The Second Circuit's decision adopting the District Court's reasoning was incorrect because:

1. The original panel of the Second Circuit which affirmed the District Court's dismissal of the initial FRLA claim did so prior to discovery, because the claim was supposedly *factually unfounded*, rather than legally unsound. *See Stern v. General Electric Co.*, 924 F.2d 472, 478 (2d Cir. 1991) The Circuit Court stated that "The Directors' support of GE/PAC is limited to funding its administrative expenses and encouraging corporate employees to make voluntary contributions. Because those expenditures do not constitute direct communication with government officials, they need not be reported under FRLA." *Id.* As

is evident from the statement of the case above, the factual assumptions about the role of GE Management underlying this holding were subsequently shown to be incorrect and incomplete. Discovery revealed that the corporation's lobbyists, operating under close Management supervision and control, were using GE/PAC funds as part of their direct communications with government officials.

2. The District Court relied on its earlier decision that *FECA* governs any claim that PAC administrative funds are reportable under *FRLA*. This conclusion is a demonstrable legal error on a crucial question of federal law. (B-5)

REASONS WHY THE WRIT SHOULD BE GRANTED

The issue of whether the FRLA disclosure requirements are triggered by the control and use of PAC funds by corporate lobbyists is an important question of federal law which has not been, but should be settled by this Court. *See, e.g.*, Rule 10(1)(c) of the Rules of the Supreme Court. In light of the pervasive impact of PAC money on the current system of campaign finance, this question is of paramount significance to the integrity of the legislative and electoral processes.

The provisions of FRLA were intended to expose to scrutiny the legislative activity of special interest groups. In the leading FRLA decision to date, this Court described the reasoning behind the statute in the following way:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. *Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the*

> *public weal.* This is the evil which the Lobbying Act was designed to help prevent.
>
> *Harriss v. United States*, 347 U.S. 612, 625 (1954) (Emphasis added.)

This Court should grant certiorari to decide whether the immense leverage brought to bear by those who dangle PAC contributions before Members of Congress in return for "access" on important legislation is among those pressures which FRLA was designed to bring out into the open.

Recognition of the importance of FRLA's objectives led this Court to go to considerable lengths in *Harriss* to uphold the statute in the face of a strong constitutional challenge. These same objectives continue to be vital to the sound functioning of the legislative and electoral processes.

Today, more than ever, citizens need enforcement of the principles of openness and full disclosure embodied in FRLA. Public confidence in the integrity of government and their elected representatives has eroded substantially. There is widespread concern that the powerful and well-connected are asserting improper influence behind the closed doors of government and the perception that Members of Congress are at the beck and call of large special interest PAC contributors is rampant. These suspicions can be significantly allayed through adequate disclosure of lobbying activities – including corporate lobbying through PAC operations. Such openness not only reduces corruption by exposing activities to the disinfectant of sunlight, it also allows the *electorate* to determine "who owes what to whom" and to judge the acts of their elected representatives accordingly.

This case presents an opportunity for the Supreme Court to restore vigor to a statute that was intended to promote open government and help preserve the democratic processes established by the Constitution. There is no reason for this Court to hesitate on the possibility Congress may pass additional legislation. Existing legislation can be made much more effective by

this Court's settling on a proper interpretation and application of FRLA in keeping with the original Congressional intent. Repeated calls for Congressional campaign finance and lobbying reform, most recently echoed in the last presidential campaign, have failed to produce legislative results because of the natural overriding interest of Members of Congress in their own political self-preservation.

This writ should be granted to clarify the applicability of the FRLA statute to the corporate use of PACs and PAC funds for Congressional lobbying.

ARGUMENT

GE'S CONTROL AND USE OF PAC FUNDS FOR LOBBYING REQUIRES REPORTING OF THE CORPORATION'S PAC EXPENSES UNDER THE FEDERAL REGULATION OF LOBBYING ACT

So long as a corporate PAC is independently managed by its designated PAC committee, its activities are exempt from the Federal Regulation of Lobbying Act (under 2 U.S.C. Section 266). However, petitioner urges that once the *corporation* takes over control of the PAC and uses the PAC's funds for corporate lobbying activities, the *corporation itself* becomes subject to the reporting requirements of FRLA.

Plaintiff's original complaint alleged that the defendants' use of GE/PAC funds for lobbying purposes violated the Federal Regulation of Lobbying Act, 2 U.S.C. Section 261 *et seq.* The District Court dismissed that claim and the Circuit Court affirmed, saying:

> It is the corporate employees who contribute the money that *GE/PAC uses to lobby members of Congress.* The Directors' support of GE/PAC is limited to funding its administrative expenses, and encouraging corporate employees to make voluntary contributions. Because these expenditures do not constitute "direct communication" with government officials, they need

> not be reported under the FRLA. As such, the Directors did not expose GE to liability under the FRLA, and the allegations in Count Two are unfounded. 924 F.2d 472, 478 (2d Cir. 1991) (Emphasis added.)

The assumption that it was the PAC itself that was lobbying Congress was based on misrepresentations made to the District Court by GE, later repeated to the Second Circuit Court of Appeals, that: "None of the defendants, all of whom are members of the GE Board of Directors and some of whom are also members of GE's Executive Office, have any role whatsoever in the operation of the GE/PAC or the distribution by it of contributed funds."

It is now known from the depositions of GE officers and employees, including Board Chairman Welch, that *all* decisions on distribution of GE/PAC funds to Members of Congress are made by GE's lobbyists under Management's close supervision and that the GE/PAC committee is not even consulted on those decisions. This activity has been carried out with the direct knowledge and approval of the key inside Director (Welch) and the knowledge of at least the two other inside Directors (defendants Hood and Bossidy). It is now clear that the facts fully support a finding that FRLA has been violated — *not* by the GE/PAC, which is exempt — but by the *corporation itself* and its inside Directors.

When plaintiff sought to revive the FRLA claim after discovery, the District Court denied the application, saying:

> The amendment plaintiff now seeks to add contains essentially the same claim as the FRLA count previously dismissed. We do not agree that the information provided in discovery, as argued by plaintiff, justifies re-pleading a claim that was found to be specifically and entirely *unfounded under the law.* (B-6) (Emphasis added.)

The District Court was wrong. The original finding was based on mistaken facts [that it was the PAC that conducted the

lobbying], not on an analysis of the law. The legal question is what this Court should now decide.

Applicability of FRLA to the Corporation

The United States Supreme Court summarized the "three prerequisites to coverage" under Section 307 of FRLA (2 U.S.C. Section 266) as follows in *Harriss v. United States*, 347 U.S. at 623:

> (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.

As described above, Management employees of GE, including the Chairman of the GE Board, are directly involved in the "solicitation" of contributions whose "main purpose" is to influence the passage or defeat of legislation in Congress. The intended method of accomplishing this purpose is through direct communication with Members of Congress.

The GE/PAC Secretary, Susan M. Walter, described in her deposition how GE lobbyists decide *which* Members of Congress receive GE/PAC funds collected from GE employees. Internal GE documents show that the lobbyists distribute GE/PAC money based on the Members' connection to specific legislative issues of interest to GE. The "main purpose" of PAC contributions (and PAC administrative expenses) is to influence the passage or defeat of legislation. GE/PAC contributions are an integral part of the "direct communication" chain to the Members of Congress whose position on legislation the GE lobbyists wish to influence.

The easiest way to understand the use of PAC money for lobbying is to focus on how most corporate lobbyists gain access

to Members of Congress in order to communicate directly with them – through the "Capitol Hill Fundraiser." The Member himself is set out as bait for the lobbyists who attend such fundraisers. Lobbyists use PAC funds to buy tickets to these events expressly so they can shake hands with the Member, identify themselves and their corporate affiliations, and then discuss at the time of the fundraiser or thereafter the specific legislation they hope the Member will help pass or defeat. The "Capitol Hill Fundraiser" (often held at the Capitol Hill Club at 300 1st St., S.E. close to the House office buildings) is where corporations gain "access" to Members of Congress and make their direct communications on legislation. Some corporate executives may be able to communicate directly with Members in their offices, but the door-opener in almost every case is a PAC contribution delivered in the form of a PAC check.

The persons who buy the tickets and attend these Congressional fundraisers are not representatives of the independent GE/PAC committee, but the Corporation's paid Washington lobbyists.

GE Chairman Welch described this very process in his deposition when he explained the Washington lobbying activities overseen by Executive Vice President Frank P. Doyle:

Q. What do you understand his [Doyle's] role to be with respect to the PAC?

A. Well he has been responsible for the Washington office for some period of time, so it's in his interest I think that the PAC exists to help him with his job.

Q. Can you explain that; how does it help him with his job?

A. We believe it helps him get access to the right people to present our side of the issues.

Q. How does it do that?

A. Hopefully through, they have a variety of fund-raisers and other things that we participate in.

The important question of federal law which needs to be settled by this Court is whether a corporation's solicitation of PAC contributions to be used for lobbying *by the corporation* (as contrasted to an exempt political committee) are covered by the Federal Regulation of Lobbying Act. The question is presented here for the first time.

This issue is of major public importance because it determines the public's right to know what legislative issues are being influenced by PAC sponsors who use their PAC money for lobbying purposes rather than to support candidates in contested elections. The whole purpose behind FRLA is public disclosure, and the statute should be interpreted broadly to carry out its purpose and intent.

Defendant GE and its key employees meet all the prerequisites of FRLA applicability and are obligated to report the payment of PAC administrative and solicitation expenses as *expenditures made in connection with attempting to influence the passage or defeat of legislation*. GE's failure to do so exposes GE to liability under FRLA and is detrimental to the interests of its shareholders.

What triggers corporate FRLA liability is *corporate control*. The PAC's activities would clearly be exempt from FRLA as long as the PAC committee itself independently operated the PAC. However, once control is surrendered to the corporation and its lobbyists, the PAC's operations are no longer exempt from scrutiny and the *corporation* becomes subject to FRLA and its reporting obligations.

FRLA's Reporting Obligations

2 U.S.C. Section 266 provides as follows:

> Section 266. The provisions of this title shall apply to *any person* (except a political committee as defined

> in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), *who* by himself, or *through any agent or employee* or other persons *in any manner whatsoever, directly or indirectly, solicits*, collects, or receives *money* or any other thing of value *to be used principally to aid*, or the principal purpose of which person is to aid, *in the accomplishment of any of the following purposes*:
>
> (a) The passage or defeat of any legislation by the Congress of the United States.
>
> (b) *To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.* (Emphasis added.)

Whether GE itself is covered by Section 266 turns on whether the *corporation*, acting through its officers, agents or employees, knowingly and intentionally *solicits money* to be used principally for lobbying for or against legislation in Congress.

It is obvious that Congress anticipated roundabout solicitation of funds for lobbying purposes by its inclusion of the phrases "in any manner whatsoever" and "directly or indirectly" in the statute. It cannot be disputed that the misuse of PACs for lobbying rather than electioneering purposes was one possible "manner whatsoever" the legislation was designed to reach.

The evidence in this case shows beyond all doubt that the *corporation*, as employer, solicited PAC contributions *explicitly and openly to be used for corporate lobbying purposes* from the very outset of the solicitation process. Not only do GE employees perform the bulk of direct solicitation of contributions as fundraising "Zone Captains" but the top executives of the company, as well as the Washington lobbyists, are also directly engaged in planning, promoting, advocating and overseeing the solicitation process. The videotape described above is one of the PAC solicitation tools employed by the corporation which clearly ties PAC solicitation to the corporation's lobbying goals.

How FRLA Applies to GE

Although the purposes of FRLA are clear, the draftsmanship is less so. A patient step-by-step analysis is necessary to determine how FRLA applies to the corporation and just what the corporation is obligated to report in order to be in compliance.

Step. 1. 2 U.S.C. Section 266 controls who is covered by the Act. That section expressly excepts "a political committee" as defined in FECA. The GE/PAC itself therefore has no reporting obligations under FRLA, *even if* it solicits or receives money to be used to influence the passage or defeat of Congressional legislation.

The exception, however, is *explicitly limited* to a "political committee" as defined in FECA. It does not extend to corporations, corporate officers or corporate Management employees who control a captive PAC.

So long as the corporation and its officers and Management employees solicit money for purposes *other than* influencing the passage or defeat of legislation, the corporation is still not subject to FRLA reporting requirements. However, when the purpose of the corporate solicitation is to influence the passage or defeat of legislation, then FRLA becomes applicable, and since the corporation is *not* a "political committee" it becomes obligated to comply with the statute.

Step. 2. Once the corporation becomes obligated to file reports under FRLA, the next question is: what must the corporation report? 2 U.S.C. Section 264 spells out the reporting requirements applicable to GE. In this instance the corporation should be reporting as a person "expending" money, and doing so for the purpose of influencing legislation. The expenditure reporting requirements are set forth in subparagraphs (4) through (6). In the case of GE, these provisions require reporting expenditures of *corporate funds* for administration of the GE/PAC (including

solicitation expenses),[3] and also the "purpose of such expenditure" (subparagraph (a)(4)). Since Section 264 is cross-referenced to "subparagraph (a) or (b) of Section 266 of this title," the corporation is necessarily obligated to report the legislation whose passage or defeat it is seeking to influence.

Step 3. The corporation need *not* report the actual contributions made by employees to GE/PAC, nor the payments made by the PAC to Members of Congress. These are "practices or activities regulated by" FECA and are reportable to the Federal Election Commission. They are exempt from FRLA reporting requirements under 2 U.S.C. Section 270. However, Section 270 does not limit the scope of Section 266 which determines *who* is covered by FRLA (as opposed to what "practices or activities" are *reportable*). As noted above, Section 266 contains its own, *limited* exemption for political committees only. Read together, Sections 266 and 270 establish that PACs alone are exempted from all FRLA coverage, and others who are covered by FRLA need not report any activity already reportable under FECA, i.e., employee contributions to GE/PAC and direct GE/PAC payments.

The Section 270 exemption does not extend to the expenditure of corporate funds for PAC administrative expenses, since these are *not* reportable to the Federal Election Commission, nor are

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[3] Midway during discovery, GE stipulated that the corporation expended the following sums for the administration of GE/PAC, none of which are reported to the FEC (or elsewhere):

1983	$188,431
1984	212,563
1985	187,705
1986	227,622
1987	255,756
1988	245,357
1989	247,154
1990	272,952

These expenditures should have been publicly disclosed as part of the corporation's reporting obligations under FRLA.

they regulated by FECA. Those amounts are what GE must report under FRLA.

The legislative history of FRLA indicates quite clearly that the FECA exemption is only meant to prevent duplicate reporting and therefore applies *only to those who actually file reports* under that statute (i.e., Political Action Committees). Senator LaFollette, the FRLA's Senate sponsor, stated this plainly:

> Fourth. It [FRLA] does not require any reports of any persons or organizations now required to report under the provisions of the present Corrupt Practices Act.
>
> 92 Cong. Rec. 6386 (1946).

The legislative history of FECA, which permits corporate treasury funds to be used for PAC administrative expenses (but does not require reporting such expenses), likewise makes it clear that the FECA provision was never intended to preempt lobbying reporting or regulation under FRLA.

Representative Hansen, FECA's sponsor, speaking just before the final vote in the House, was explicit. He said of Section 610 (predecessor of FECA Section 441b):

> [T]his would not cover corporate or union legislative activities. Lobbying is a separate field which has traditionally been, and should continue to be, regulated separately.
>
> 117 Cong. Rec. 43,380 (1971).

Both statements mesh exactly: FRLA does not require reporting by a corporation of what is already reported by the PAC under FECA (LaFollette); and FECA does not exempt a corporation from reporting lobbying expenses under FRLA (Hansen).

Remarks by a key sponsor are "an authoritative guide to the statute's construction," *North Haven Board of Educ. v. Bell*, 456

U.S. 512, 526 (1982) and "deserve to be accorded substantial weight." *Ibid, quoting FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). This is so particularly where the Member of Congress' statements "are consistent with the statutory language and other legislative history." *Brock v. Pierce County*, 476 U.S. 253, 263 (1986).

The foregoing analysis places the application of FRLA to GE in sound perspective, avoids duplication of efforts and regulatory oversight, and satisfies the purposes and objectives of FRLA.

GE's obligation under that statute is to report its own expenditure of corporate funds to facilitate the lobbying activities, and to identify the legislation those expenditures are intended to help influence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 28, 1994

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1471—August Term, 1993

(Argued April 27, 1994 Decided May 16, 1994)

Docket No. 93-9281

HENRY D. SEDGWICK STERN and WALTER B. SLOCOMBE, Personal Representatives of the Estate of Philip M. Stern,

Plaintiffs-Appellants,

—v.—

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., LAWRENCE A. BOSSIDY, EDWARD E. HOOD, JR., RICHARD T. BAKER, JAMES G. BOSWELL II, SILAS C. CATHCART, CHARLES D. DICKEY, JR., LAWRENCE E. FOURAKER, HENRY H. HENLEY, HENRY L. HILLMAN, ROBERT E. MERCER, GERTRUDE G. MICHELSON, BARBARA SCOTT PREISKEL, LEWIS T. PRESTON, FRANK H.T. RHODES, ANDREW C. SIEGLER and WALTER B. WRISTON,

Defendants-Appellees.

Before:

VAN GRAAFEILAND and WINTER, *Circuit Judges*, and MISHLER, *District Judge.**

---

* The Honorable Jacob Mishler, United States District Judge for the Eastern District of New York, sitting by designation.

Appeal from two orders and a judgment of the United States District Court for the Southern District of New York (Mary Johnson Lowe, *Judge*), denying plaintiffs' motion to amend the amended complaint and granting the defendants' motion for summary judgment. The orders and judgment are affirmed for substantially the reasons stated below.

WHITNEY NORTH SEYMOUR, JR., New York, New York (Craig A. Landy, Peter James Clines, Brown & Seymour, New York, New York, of counsel) *for Plaintiffs-Appellants.*

THOMAS P. OGDEN, New York, New York (Wendy L. Trugman, Davis Polk & Wardwell, New York, New York, E. Scott Gilbert, Counsel, General Electric Company, Fairfield, Connecticut, of counsel) *for Defendants-Appellees.*

PER CURIAM:

We affirm for substantially the reasons stated by the district court. *See Stern v. General Elec. Co.*, 837 F. Supp. 72 (S.D.N.Y. 1993); *Stern v. General Elec. Co.*, 1992 WL 138339 (S.D.N.Y. June 2, 1992).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

PHILIP M. STERN,

Plaintiff,

- against -

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., LAWRENCE A. BOSSIDY, EDWARD E. HOOD, JR., RICHARD T. BAKER, JAMES G. BOSWELL, II, SILAS C. CATHCART, CHARLES D. DICKEY, JR., LAWRENCE E. FOURAKER, HENRY H. HENLEY, JR., HENRY L. HILLMAN, ROBERT E. MERCER, GERTRUDE G. MICHELSON, BARBARA SCOTT PREISKEL, LEWIS T. PRESTON, FRANK H.T. RHODES, ANDREW C. SIGLER, and WALTER B. WRISTON,

Defendants.

OPINION AND ORDER
86 Civ. 4055 (MJL)

----------x

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MARY JOHNSON LOWE, D.J.

This is a shareholder derivative action against General Electric Company ("GE") and individual directors of GE, alleging corporate waste in connection with the funding of a political action committee ("GE/PAC"). The action has had a lengthy history in this Court, familiarity with which will be presumed.[1] Most recently, this Court issued an Opinion and Order, dated December 31, 1991, which denied defendants' motion to dismiss the amended complaint. Subsequently, the action was referred to Magistrate Judge Naomi Reice Buchwald for general pretrial supervision. Plaintiff has objected to a discovery ruling made by Magistrate Judge Buchwald pursuant to this reference. In addition, plaintiff has moved to further amend his complaint, pursuant to Fed.R.Civ.P. 15.

Magistrate Judge Buchwald's Discovery Ruling

Plaintiff objects to the decision made by Magistrate Judge Buchwald, contained in a letter to counsel dated March 4, 1992, that "discovery related to voluntariness may not be conducted." This ruling specifically denied plaintiff's request to discover the names and addresses of former employees, which they sought "in order to interview those employees concerning the manner in which GE/PAC contributions were solicited." Plaintiff's Objections at 2. The magistrate judge's ruling was made in the context of her consideration of how the issue of voluntariness related

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[1] *See Stern v. General Electric Company*, No. 86 Civ. 4055, slip op. (S.D.N.Y. May 15, 1987); *Stern v. General Electric Company*, No. 86 Civ. 4055, slip op. (S.D.N.Y. March 26, 1990); *Stern v. General Electric Co.*, 924 F.2d 472 (2d Cir. 1991); *Stern v. General Electric Co.*, No. 86 Civ. 4055, slip op. (S.D.N.Y. December 31, 1991).

to the amended complaint's allegations of corporate waste. Plaintiff objects to the ruling, claiming that it is in contradiction to this Court's Opinion of December 31, 1992, which denied defendants' motion to dismiss the complaint for failure to state a claim.

The decision of a Magistrate Judge on a discovery matter is to be overturned by the District Court only if it is found to be "clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a); 28 U.S.C. § 636(b)(1)(A). Plaintiff claims that Magistrate Judge Buchwald's decision to preclude discovery as to voluntariness was contrary to the law of this case. He claims that, by denying the motion to dismiss, the Court, by definition, was allowing investigation into the issue of the voluntariness of employee contributions to GE/PAC. Defendant argues in opposition that neither the December 31, 1991 decision of this Court, nor the prior opinion of the Second Circuit Court of Appeals, contains anything which would restrain the magistrate judge's discretion on this matter.

Based on our review of these issues, we agree with the magistrate judge that the issue of voluntariness of employee PAC contribution has no connection to the allegations of corporate waste in the amended complaint. Thus, we read the magistrate judge's conclusion that "the concepts of fraud and bad faith have been injected into the case inappropriately," to have been made in the context of the discussion of the relevance of those concepts to the issue of voluntariness. Because we find no connection between the issue of voluntariness and the allegations of corporate waste, we agree that plaintiff need not be given discovery on the issue. For these reasons, we find no error in the decision of Magistrate Judge Buchwald, as stated in her letter to the parties of March 4, 1992, and affirm her decision in full.

Motion to Further Amend the Complaint

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint "shall be freely given when

justice so requires." *See also S.S. Silberblatt, Inc. v. East Harlem Pilot Block*, 608 F.2d 28, 42 (2d Cir. 1979). However, such leave shall be denied if an amendment is found to be in bad faith or unduly prejudicial to the opposing party, or if it would cause undue delay or would be futile if allowed. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Tokio Marine and Fire Insurance Company, Ltd. v. Employers Insurance of Wausau*, 786 F.2d 101, 103 (2d Cir. 1986). A futile amendment is one that would be subject to a motion to dismiss for failure to state a claim. *See Leonelli v. Pennwalt Corp.*, 887 F.2d 1195, 1198 (2d Cir. 1989); *Freeman v. Marine Midland Bank-New York*, 494 F.2d 1334, 1338 (2d Cir. 1974). Defendants here claim that plaintiff's proposed amendment would be futile. Thus, in the context of these guiding principles, we will consider the legal sufficiency of the proposed amendment. *See Cordillo v. Sos*, 90 Civ. 0009 (J. Conner), slip op., 1992 U.S. Dist. Lexis 1957 (S.D.N.Y. Feb. 18, 1992).

Plaintiff seeks to add, as an eighth claim for relief, a claim of violation of the Federal Regulation of Lobbying Act ("FRLA"), 2 U.S.C. §§ 261 *et seq.* It is relevant to note here that plaintiff's original complaint contained allegations of violations of the FRLA which were dismissed by this Court. *Stern v. General Electric Company*, No. 86 Civ. 4055, slip op. (S.D.N.Y. May 15, 1987). Furthermore, the dismissal of these claims was affirmed by the U.S. Court of Appeals for the Second Circuit. *Stern v. General Electric Company*, 924 F.2d 472 (2d Cir. 1991). Plaintiff now claims that the Second Circuit's decision was "based on a finding that *GE/PAC*, rather than *GE itself*, was using the GE/PAC funds for lobbying." Memorandum of Law in Support of Plaintiff's Motion to Further Amend Complaint, March 12, 1992 ("Plaintiff's Memorandum"), at 2-3 (emphasis in original). Plaintiff further claims that "[t]he Court of Appeals was led to this finding by representations of defendants' counsel." *Id.* at 3. In defending his claim that an amendment is appropriate, plaintiff claims that "subsequent discovery" has shown that "the

corporation's payment of the GE/PAC's administrative expenses directly supports. . . lobbying efforts, [and] GE's failure to report these payments constitutes a violation of FRLA, potentially subjecting the corporation to liability." *Id.* at 3.

We find nothing in plaintiff's current argument that would lead us to reinstate allegations of FRLA violations that have been found inadequate as a matter of law by both this Court and the Second Circuit. In our decision of May 15, 1987, we specifically stated:

> The GE/PAC is a "political committee". 2 U.S.C. § 266. As such its activities are regulated by the FECA [Federal Election Campaign Act], and not the FRLA. 2 U.S.C. § 270. If plaintiff's complaint is that corporate funds used to administer the GE/PAC are expended improperly by the GE/PAC for lobbying purposes, this is precisely the type of complaint the FECA was designed to adjudicate.

Stern v. General Electric Company, No. 86 Civ. 4055, slip op. (S.D.N.Y. May 15, 1987) at 10. Furthermore, the Second Circuit clearly articulated its agreement with the reasoning of this Court in affirming our dismissal of the FRLA count:

> It is the corporate employees who contribute the money that GE/PAC uses to lobby members of Congress. The Directors' support of GE/PAC is limited to funding its administrative expenses, and encouraging corporate employees to make voluntary contributions. Because these expenditures do not constitute "direct communication" with government officials, they need not be reported under the FRLA. As such, the Directors did not expose GE to liability under the FRLA, and the allegations in Count Two are unfounded.

Stern v. General Electric Co., 924 F.2d 472, 478 (2d Cir. 1991).

The amendment plaintiff now seeks to add contains essentially the same claim as the FRLA count previously dismissed. We do not agree that the information provided in discovery, as argued by plaintiff, justifies re-pleading a claim that was found to be specifically and entirely unfounded under the law. *See Harriss v. United States*, 347 U.S. 612, 623 (1954). The amendment is without merit, as has been demonstrated by the prior decisions in this action. To allow it now would only serve to further delay this action and invite a motion to dismiss from defendants. As such, this motion must be denied.

CONCLUSION

For these reasons, plaintiff's motion to further amend the complaint is denied. In addition, the discovery ruling of Magistrate Judge Buchwald, as contained in the letter to counsel dated March 4, 1992, is affirmed. This action shall remain with Magistrate Judge Buchwald for pretrial supervision.

It Is So Ordered.

Dated: New York, New York
June 2, 1992

/s/Mary Johnson Lowe
United States District Judge

APPENDIX C

§ 261. Definitions

When used in this chapter –

(a) The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

(b) The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure.

(c) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons.

(d) The term "Clerk" means the Clerk of the House of Representative of the United States.

(e) The term "legislation means bills, resolutions, amendments, nominations, and other matters pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House.

§ 262. Detailed accounts of contributions; retention of receipted bills of expenditures

(a) It shall be the duty of every person who shall in any manner solicit or receive a contribution to any organization or fund for the purposes hereinafter designated to keep a detailed and exact account of –

(1) all contributions of any amount or of any value whatsoever;

(2) the name and address of every person making any such contribution of $500 or more and the date thereof;

(3) all expenditures made by or on behalf of such organization or fund; and

(4) the name and address of every person to whom any such expenditure is made and the date thereof.

(b) It shall be the duty of such person to obtain and keep a receipted bill, stating the particulars, for every expenditure of such funds exceeding $10 in amount, and to preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

§ 263. Receipts for contributions

Every individual who receives a contribution of $500 or more for any of the purposes hereinafter designated shall within five days after receipt thereof rendered to the person or organization for which such contribution was received a detailed account thereof, including the name and address of the person making such contribution and the date on which received.

§ 264. Statements of accounts filed with Clerk of House

(a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 266 of this title shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing —

(1) the name and address of each person who has made a contribution of $500 or more not mentioned in the preceding report; except that the first report filed pursuant to this chapter shall contain the name and address of each person who has made any contribution of $500 or more to such person since August 2, 1946;

(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1) of this subsection;

(3) the total sum of all contributions made to or for such person during the calendar year;

(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4) of this subsection;

(6) the total sum of all expenditures made by or on behalf of such person during the calendar year.

(b) The statements required to be filed by subsection (a) of this section shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

§ 265. Preservation of statements

A statement required by this chapter to be filed with the Clerk—

(a) shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia, but in the event it is not received, a duplicate of such statement shall be promptly filed upon notice by the Clerk of its nonreceipt;

(b) shall be preserved by the Clerk for a period of two years from the date of filing, shall constitute part of the public records of his office, and shall be open to public inspection.

§ 266. **Persons to whom chapter is applicable**

The provisions of this chapter shall apply to any person (except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

§ 267. **Registration of lobbyists with Secretary of the Senate and Clerk of House; compilation of information**

(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registered shall, between the first and tenth day of each calendar quarter, so long

as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.

§ 268. Reports and statements under oath

All reports and statements required under this chapter shall be made under oath, before an officer authorized by law to administer oaths.

§ 269. Penalties and prohibitions

(a) Any person who violates any of the provisions of this chapter, shall, upon conviction, be guilty of a misdemeanor,

and shall be punished by a fine of not more than $5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a) of this section, any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

§ 270. Exemptions from chapter

The provisions of this chapter shall not apply to practices or activities regulated by the Federal Corrupt Practices Act nor be construed as repealing any portion of said Federal Corrupt Practices Act.

APPENDIX D

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election

to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful –

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful –

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and

specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

No. 94-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HENRY D. SEDGWICK STERN and WALTER B. SLOCOMBE,
Personal Representatives of the Estate of Philip M. Stern,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., LAWRENCE A. BOSSIDY, EDWARD E. HOOD, JR., RICHARD T. BAKER, JAMES G. BOSWELL II, SILAS C. CATHCART, CHARLES D. DICKEY, JR., LAWRENCE E. FOURAKER, HENRY H. HENLEY, HENRY L. HILLMAN, ROBERT E. MERCER, GERTRUDE G. MICHELSON, BARBARA SCOTT PREISKEL, LEWIS T. PRESTON, FRANK H.T. RHODES, ANDREW C. SIEGLER and WALTER B. WRISTON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION RESTATED

Should this Court review a District Court's discretionary decision denying a motion to further amend an amended complaint to add a state law claim for corporate waste arising out of an alleged violation of the Federal Regulation of Lobbying Act?

STATEMENT REQUIRED BY RULE 29.1

Respondent General Electric Company does not have a parent company. In addition to its wholly-owned subsidiaries, General Electric has ownership interests in the following companies which have publicly-held debt or equity securities:

GECC Financial Corporation (Hawaii)

General Electric Capital Corporation
(formerly General Electric Credit Corporation)

General Electric Capital Canada, Inc.

General Electric Capital Services, Inc.
(formerly General Electric Financial
Services, Inc.)

General Electric Credit International, N.V.

Montgomery Ward & Co., Incorporated (50% GE owned)

CAMCO, Inc. (Canada) (51% GE owned)

General Electric Capital Preferred Asset
Corporation

GNA Corporation

Mercur Bank (Austria)

Imaging Financial Services, Inc.
(formerly Eastman Kodak Credit Corp.)

Dart & Kraft Leasing Corporation

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IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents General Electric Company (''GE'') and the present and former GE directors named as defendants in petitioner's amended complaint request that this Court deny the petition for writ of certiorari to the Court of Appeals for the Second Circuit.

Petitioner would have this Court review a discretionary decision by a District Court denying a motion to further

amend an amended complaint. The motion sought to add a claim for corporate waste arising out of an alleged violation of the Federal Regulation of Lobbying Act (''FRLA'') (App. B-1-B-6).[1] Contrary to the petition, this case does not present a question of federal law. Instead, the case involves a question of state law — whether the individual defendants engaged in corporate waste in connection with GE's political action committee — that turns in part on an interpretation of the FRLA. Even if petitioner's FRLA allegations were not entirely derived from state law claims, the FRLA questions he raises present no conflict among the Circuits, and the decisions below are fully consistent with Supreme Court precedent. Accordingly, this case is plainly inappropriate for consideration by this Court.

STATEMENT OF THE CASE

This petition represents the culmination of an eight-year-old shareholder derivative action claiming that GE's support of a political action committee (''GE/PAC'') constitutes a waste of corporate assets under the law of New York, the state of GE's incorporation.[2] During the long history of this litigation, the Court of Appeals for the Second Circuit, the District Court for the Southern District of New York, the Court of Appeals for the District of Columbia Circuit, the District of Columbia District Court and the Federal Election Commission have repeatedly held that GE and GE/PAC have fully complied with the federal election laws that authorize corporations, unions and other groups to sponsor PACs. Contrary to petitioner's belief, a shareholder derivative action is

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1 Citations to ''App.'' are to the Appendix accompanying the petition.

2 The original shareholder plaintiff Philip M. Stern died on June 1, 1992. The personal representatives of his estate were substituted as plaintiffs by order of the District Court entered September 4, 1992. For simplicity, the various plaintiffs will be referred to herein as petitioner.

not an appropriate forum for debating whether these federal laws are sound public policy.[3]

Petitioner's original shareholder derivative complaint was filed in May 1986. It included allegations of corporate waste arising out of alleged violations of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (''FRLA'' or the ''Act''), and the federal anti-bribery statute, 18 U.S.C. § 203, as well as the alleged lack of benefit to GE from its financial support of GE/PAC. The FRLA allegations asserted that the individual defendants had exposed GE to prosecution under the Act for not reporting the administrative expenses of GE/PAC as ''lobbying'' expenses. The linchpin of petitioner's argument was his allegation that GE/PAC contributions were used by GE management to ''lobby'' Congress, as that term is used under the FRLA.

Petitioner's original complaint, including the FRLA allegations, was dismissed by the District Court in May 1987.[4] On appeal, the Court of Appeals for the Second Circuit affirmed, but granted petitioner leave to replead his allegations of corporate waste arising out of GE/PAC's alleged lack

---

3. Petitioner Philip Stern was an activist who used his considerable wealth to promote a variety of social and political causes. He wrote an anti-PAC study, *The Best Congress Money Can Buy* (1988), as well as a sequel, *Still the Best Congress Money Can Buy* (1992). He also appeared as an anti-PAC spokesman on radio and television programs. Petitioner and petitioner's counsel founded Citizens Against PACs, a political advocacy group.

4. Petitioner also filed an administrative complaint with the Federal Election Commission (''FEC''), alleging that GE and GE/PAC had violated the Federal Election Campaign Act (''FECA''), 2 U.S.C. §§ 431-55. The FEC dismissed these charges in a decision subsequently affirmed by the District of Columbia District Court and the Court of Appeals for the District of Columbia Circuit. *See Stern* v. *FEC*, 921 F.2d 296, 298-99 (D.C. Cir. 1990).

of benefit to GE. *Stern* v. *General Electric Co.*, 924 F.2d 472 (2d Cir. 1991). In April 1991, petitioner filed an amended complaint. On December 31, 1991, the District Court denied respondents' motion to dismiss the amended allegations of corporate waste and ordered expedited discovery.

Discovery established that GE/PAC operates under the supervision of a committee of 25 to 30 GE managers and professionals from the various GE business units. A GE/PAC chairman, vice chairman and other officers are elected from among the committee members. The annual GE/PAC solicitations are organized around committee members who serve as "Zone Captains," distribute written materials on GE/PAC and contact eligible employees within their business units.

The GE/PAC committee holds annual meetings at which an estimated contribution budget for the following year is approved. Before 1991, a PAC subcommittee would meet prior to the annual meeting with the GE government relations staff and determine a two-year line-by-line budget identifying contributions to particular candidates. In 1991, the process was simplified as part of a corporate-wide effort at reducing paperwork and bureaucracy. Under the current system, the GE/PAC committee approves an annual budget allocating estimated contributions among House and Senate campaigns and the two major parties. While retaining ultimate authority over all contribution decisions, the committee then delegates candidate-by-candidate determinations to GE government relations experts. Individual participants have the option to designate the party or candidate of their choice. All GE/PAC campaign contributions are reported to the committee on a monthly basis and in annual reports distributed to all GE/PAC contributors.

On March 12, 1992, near the end of discovery, petitioner moved to further amend his complaint to add a cause of action identical in substance to the FRLA allegations set forth in his original complaint that had previously been dismissed.

In an attempt at avoiding the prior dispositive holdings of the District Court and the Court of Appeals, petitioner asserted that "new" facts had been discovered. The District Court rejected this claim and denied petitioner's motion to amend on June 2, 1992 concluding, in the exercise of its discretion, that "nothing in petitioner's current argument . . . would lead us to reinstate allegations of FRLA violations that have been found inadequate as a matter of law by both this Court and the Second Circuit." (App. B-5).

On May 16, 1994, the Court of Appeals for the Second Circuit summarily affirmed the District Court's decision denying petitioner's motion to amend the amended complaint (App. A-1). This petition for a writ of certiorari to the Court of Appeals for the Second Circuit was filed with the Court and received by respondents on July 5, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Federal Question Justifying Supreme Court Review.

Petitioner suggests that he possesses a claim under the FRLA (*see* Pet. at 2-3). In fact, the FRLA is a criminal statute enforceable only by prosecution, with no express or implied private right of action. Petitioner's FRLA "claim" arises only in the context of a shareholder derivative claim in which petitioner maintains that the GE directors named as defendants engaged in corporate waste by exposing GE to prosecution for violation of the FRLA. This corporate waste claim arises solely under state law and does *not* directly raise a federal question.[5]

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5. The original and amended complaints did not allege federal question jurisdiction, but relied solely on diversity of citizenship.

Where, as here, the sole issue before this Court is one involving state law, a grant of certiorari is inappropriate. *See, e.g., Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) (''standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review''); *see also Propper* v. *Clark*, 337 U.S. 472, 486-89 (1949) (''In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable''). This is particularly the case where, as here, the state law issue was determined below in the context of a discretionary ruling on a motion to amend under Federal Rule of Civil Procedure 15(a). *See Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

II. There Is No Other Basis For Supreme Court Review

The only basis petitioner asserts for a grant of certiorari is that the case raises an important federal question under Supreme Court Rule 10.1(c). As demonstrated above, there is no federal question in this case, much less an important one. Moreover, even if petitioner's FRLA allegations were not part and parcel of a state law corporate waste claim, they would still not present any federal question of importance.

First, there is no conflict among the Circuits creating uncertainty about application of the FRLA to political action committees. As a result, there is no need for this Court to review the issues raised by petitioner's FRLA allegations. *See* Sup. Ct. Rule 10.1(a); *see also Taylor* v. *United States*, 493 U.S. 906, 907 (1989) (Stevens, J., concurring) (given lack of inter-circuit conflict, ''the Court's denial of certiorari . . . is entirely consistent with rules governing the management of our certiorari docket''). Indeed, other than in proceedings brought by petitioner, there has been only one published

ruling on the FRLA since the Court's decision in *United States* v. *Harriss*, 347 U.S. 612 (1954). *See Bradley* v. *Saxbe*, 388 F. Supp. 53 (D.D.C. 1974) (declaratory judgment that public officials are exempt from registration under FRLA).

Moreover, the District Court's discretionary decision not to permit petitioner's FRLA amendment to his amended complaint is fully consistent with this Court's interpretation of the FRLA in *Harriss*. *Harriss* involved a challenge to the FRLA as an unconstitutionally vague assault on First Amendment rights. In upholding the statute, this Court carefully narrowed its application, ruling that the FRLA only applied "to direct communication with members of Congress on pending or proposed federal legislation." 347 U.S. at 620.

As a result, neither GE/PAC nor GE's support of GE/PAC can possibly be considered "lobbying" activity under the FRLA. While the PAC seeks to improve GE's ability to compete with scores of other organizations and interest groups in communicating its positions to Congressional committees and staff as well as Members of Congress, the PAC's solicitation and campaign contribution activities are not themselves "direct communication with members of Congress." *See Stern* v. *General Electric Co.*, 924 F.2d at 478 ("Because these expenditures do not constitute 'direct communication' with government officials, they need not be reported under the FRLA." (quoting *United States* v. *Harriss*, 347 U.S. at 620)); *Federal Lobbying* 4 (J. Jacobs ed. 1989).

Petitioner repeatedly misinterprets the *Harriss* three-part test for "lobbying activities," arguing that the solicitation of contributions element of the test refers to solicitation of *campaign* contributions such as those made by GE/PAC (Pet. at 16). In fact, this element of the *Harriss* test refers only to solicitation of funds contributed to a "lobbyist" to pay the expenses of his or her "direct communication with members of Congress." *See Harriss*, 347 U.S. at 620-21. It does *not* refer to contributions to a Congressional election campaign, even if such contributions are made through persons

otherwise engaged in FRLA "lobbying" activity. *Cf. Stern* v. *FEC*, No. 89-0089, slip op. at 7-9 (D.D.C. Aug. 31, 1989), *aff'd*, 921 F.2d 296, 298 (D.C. Cir. 1990) (campaign contributions are "political" not "legislative" activities, whether or not motivated by legislative concerns).

The employee-donated funds that are contributed to election campaigns by GE/PAC are not "contributions" under the FRLA, since they are not used to fund the salaries or expenses of anyone engaged in direct communication with any member of Congress on legislative issues. Similarly, neither GE nor its government relations personnel are required to report as "lobbying" any activities in connection with the solicitation or distribution of such funds, since those activities do not entail direct communication with members on legislative issues.[6]

Petitioner invites the Court to "restore vigor" to the FRLA by, in effect, overruling *Harriss* (*see* Pet. at 13). But there is no reason for this Court to revisit its longstanding, restrictive interpretation of the FRLA. This Court has repeatedly recognized that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, ___, 112 S. Ct. 560, 563 (1991) (quoting *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). This policy is particularly applicable where, as here, the decision which the Court is invited to revisit involved the interpretation of a federal statute. "'Considerations of stare decisis have special force in

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6. Petitioner asserted for the first time on appeal and again asserts before this Court that direct communication on legislative issues does occur when GE government representatives attend fundraising events for which GE/PAC has purchased tickets (Pet. at 17). Petitioner cites no evidence for this claim, and the deposition testimony of GE's Executive Vice President in charge of government relations is to the contrary.

the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.''' *Id.* at 564 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Congress has had 40 years to address the effect of this Court's decision in *Harriss*, but it has not done so.[7]

Finally, respondents are unaware of any corporate sponsor of any PAC that reports its PAC support costs under the FRLA. Nor is such reporting even mentioned as a possibility in any case, commentary or other authority cited by petitioner or known to respondents' counsel. In fact, there is a long-standing consensus among government officials, commentators and practitioners that the FRLA as interpreted by the Court in *Harriss* is an extremely narrow statute.[8] Despite repeated calls for reform over the last 40 years, the Act has not been clarified or expanded by Congress. As the Senate Committee on Governmental Affairs stated in an April 1993 report on proposed lobbying legislation, ''the Lobbying

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7. Over 25 bills relating to Federal lobbying have been introduced in the current session of Congress. On May 6, 1993, the Senate passed S. 349, the Lobbying Disclosure Act, a bill that modifies lobbying regulations by, among other things, repealing the FRLA. On March 24, 1994, the House amended and passed S. 349, and the bill has moved to a House-Senate conference. Given that Congress is reevaluating the legislative scheme in this area, it would be particularly inappropriate for the Court to revisit its prior interpretation of the FRLA at this time.

8. *See, e.g.*, *Public Disclosure of Lobbying Act: Hearings on H.R. 15 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 665-702 (1975) (testimony and statements of Deputy Asst. Atty. Gen. Keeney and Deputy Comptroller Gen. Keller); Landau, *Public Disclosure of Lobbying*, 22 How. L.J. 27, 37-39 (1979); Comment, *First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act*, 57 Tex. L. Rev. 1219, 1222-24 (1979).

Regulation Act has been a failure: it is unclear and confusing, unenforced, and it has failed to ensure the public disclosure of meaningful information about lobbying activities." *Lobbying Disclosure Act of 1993: Report of the Senate Comm. on Governmental Affairs to Accompany S. 349*, 103rd Cong., 1st Sess. 8 (1993).

* * *

Under Rule 10.1 of the Supreme Court Rules, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion," and a petition "will be granted only when there are special and important reasons therefor." This case does not raise a federal question and is based on distorted and erroneous allegations that arise out of petitioner's personal convictions regarding the nation's campaign financing system. The FRLA issues raised by the petition are entirely inappropriate for review by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

New York, New York
August 4, 1994

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

This brief is respectfully submitted in reply to Respondents' Brief in Opposition dated August 4, 1994.

CORRECTIONS TO RESPONDENTS' STATEMENT OF THE CASE

Respondents' brief states that the District Court dismissed the FRLA claim in the original complaint in 1986, and that the dismissal was affirmed by the Court of Appeals (p. 3). What Respondents omit to state is that the basis for that affirmance was a factual misrepresentation made by GE in its brief to the Court of Appeals, to wit:

> None of the individual defendants has or had *any role whatsoever* in the operation of the GE/PAC or its distribution of contributed funds. (Emphasis added.)

The assertion that none of the Directors had "any role whatsoever" in the GE/PAC was deliberate concealment of the active role played by Board Chairman John F. Welch in the solicitation of PAC contributions. Against the true factual record subsequently developed through discovery, it is clear that the unqualified denial of "any role whatsoever" was a knowing misrepresentation by GE Management to deceive their own outside counsel and the Court.

That same lack of candor unfortunately infects Respondents' inaccurate characterization in their brief to this Court of what discovery later revealed about how GE handled the distribution of PAC funds to Members of Congress. Respondents' brief states (p. 4):

> The GE/PAC committee holds annual meetings at which an estimated contribution budget for the following year is approved. Before 1991, a PAC subcommittee would meet prior to the annual meeting with the GE government relations staff and *determine* a two-year line-by-line budget identifying contributions to particular candidates. (Emphasis added.)

The *GE/PAC committee* did not "determine" who would receive PAC funds, but merely rubber-stamped the determinations previously made by GE lobbyists, who prepared the list

of distributees for the PAC committee prior to its meeting. In fact, throughout the period of GE/PAC operations – over all the years covered by this case – GE's paid lobbyists in Washington controlled the allocation of PAC money to support their lobbying strategy. The GE/PAC committee has *never* exercised independent judgment on distribution of PAC money. The committee's function is to raise the money (with Chairman Welch's help) and the corporation's lobbyists' function is to pass it out to Members of the United States Congress.

GE Vice President Frank P. Doyle, who oversees the Washington lobbying office and reports directly to GE Board Chairman Welch, described the relationship between the GE/PAC committee and the Washington office in his deposition:

> Q. How would you describe the responsibility of the PAC committee as you know it?
>
> A. They either raise or oversee the raising of the money and they either set the budget or its distribution; they used to be more active than they are now. Now they do it in a more generalized way; they used to do it candidate-by-candidate, meeting-by-meeting.
>
> Q. Did they actually initiate the budget?
>
> A. No, they didn't; the budget is initiated in Washington by people who work Washington for us.
>
> Q. Then the budget is submitted to the committee for its approval?
>
> A. Yes.

Doyle also described the process before the 1991 change which eliminated the GE/PAC Committee entirely:

> Q. And you said the reason for that change was that over the years there had been very little change?

A. I was told that there was a lot of debate, a lot of back and forth, then in the end generally the money was allocated the way that the people in Washington saw to best allocate.

Q. The way it had originally been proposed by Washington corporate office?

A. Yes.

GE Vice President Doyle went on to describe how the purchase of tickets to Congressional fundraisers by GE's lobbyists set the stage for him to communicate directly with the Members themselves:

Q. Do you know who in the Washington office actually attends the fundraisers?

A. Yes, I do.

Q. Who are they?

A. Phil Peter, Bob Barrie, Neil Messick, Bill McManus, Dick Cook before his illness, Ann Canfield.

Q. How do you know that?

A. They are always complaining about it; it's a good part of what they do. When I ask to see one of them they will usually tell me about it.

Q. When you say it's a good part of what they do, it takes up a fair amount of time?

A. It takes up their evenings.

When Doyle himself went to see Members of Congress to discuss legislative issues, he would have the appropriate GE lobbyist set up the appointment and accompany him to the meeting:

Q. When you are not testifying but are seeing members on issues, what is the process you go through; do you actually call on them in their offices?

A. Yes. Normally the way it works is I will, assuming I am initiating, I will ask either through Phil or more likely directly, if it's a republican or democrat, find out who in Washington has regular contact with that member, ask they set up a meeting, convey the purpose of it, then we go, either responding to some piece of legislation that's developing on which we want to be heard or on more general subjects.

Q. You actually talk directly with the member?

A. Yes.

Q. Do you go alone?

A. Almost, no, I would say never.

Q. You are accompanied by whom?

A. Usually one of Phil Peter's people; occasionally by Phil himself.

Q. When you said the person in Washington who makes the contact, that's somebody on Phil Peter's staff?

A. If it's a democrat we will call on usually Bob Barrie; if it's a republican it's usually Neil Messick.

Q. You don't yourself call up and make the appointment?

A. No; one of those gents would.

These are exactly the types of direct communication with Members flowing from the use of PAC funds that trigger the statutory reporting requirements under FRLA.

ERRORS IN RESPONDENTS' ARGUMENTS ON THE WRIT

Respondents argue that "the sole issue before this Court is one involving state law" (p. 6). This is plainly incorrect. There is no issue of state law. The relevant state law is well settled: violation of a federal criminal statute (such as FRLA) constitutes corporate waste as a matter of law. *See e.g., Miller v. American Telephone & Telegraph Company*, 507 F.2d 759 (3d Cir. 1974), in which the Third Circuit Court of Appeals, interpreting New York law, declared that shareholders properly alleged that corporate directors had breached their duty by permitting violation of a federal statute which prohibited corporate campaign spending. *See also Abrams v. Allen*, 297 N.Y. 52, 56 (1947).

The sole question to be decided in this case is whether Respondents' failure to report the corporation's use of PAC money for lobbying purposes violates FRLA (and thereby constitutes corporate waste). Interpretation of FRLA is what controls that question, which is why the writ should be granted.

This petition does not seek to revisit questions already decided in *United States v. Harriss*, 347 U.S. 612 (1954) as also argued by Respondents (p. 8). What this petition seeks is an interpretation of FRLA itself as it applies to the solicitation of PAC funds by the corporation to pay the corporation's lobbyists' expenses in attending Congressional fundraisers to pave the way to communicate with the Members on specific legislative issues.

Although the Courts have said that such use of PAC funds is permitted under the FECA, they have *never* addressed the question whether such use is also reportable under the FRLA. Nothing in *Harriss* says contributions solicited for lobbying *by the corporation* (as contrasted to an exempt political committee) are excluded from FRLA Section 307. (2 U.S.C. Section 266) The question is presented here for the first time.

This issue is of major public importance because it determines the public's right to know that legislative issues are being influenced by PAC sponsors who use their PAC money for lobbying

purposes rather than to support candidates in contested elections. The whole purpose behind FRLA is public disclosure, and the statute should be interpreted to carry out its purpose and intent.

Respondents also misstate the PAC's function as "solicitation of *campaign* contributions" (p. 7; emphasis in original). This is a total inversion of what actually happens. GE/PAC committee members do *not* solicit "campaign" contributions; they openly solicit funds to be used for lobbying purposes by GE's lobbyists under the guise of campaign contributions. As pointed out in our original petition (p. 19), this is the type of indirection the statute was intended to cover, as reflected in statutory references to "directly or indirectly" and "in any manner whatsoever." When PAC funds were solicited from GE employees, the corporation openly acknowledged that the money would be used for corporate lobbying. That is why FRLA was violated when the corporation failed to report these activities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 11, 1994

Respectfully submitted,

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